

Quarterly Report
OF THE
ATTORNEY GENERAL
OF
ALABAMA



FOR THE PERIOD
FROM JANUARY 1, 1980
THROUGH MARCH 31, 1980

CHARLES A. GRADDICK, Attorney General

VOLUME 178

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of the

ATTORNEY GENERAL

of

A L A B A M A

For the Period

From January 1, 1980

Through March 31, 1980

**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1980, through March 31, 1980, is published in compliance with the provisions of Section 36-15-1, Code of Alabama 1975.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy district attorney of his county. The section also requires that I send a copy of this report to each district attorney and the chief executive officer of each incorporated municipality in the State.

The Office of the Attorney General is anxious to render prompt and efficient service to the state, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

CHARLES A. GRADDICK
Attorney General

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January 15, 1980

Mr. Anthony W. Miele
Director

Alabama Public Library Service
6030 Monticello Drive
Montgomery, Alabama 36130

Public Library Service—Libraries—Officers and Offices
Any municipal or county official may serve as a member of a public library board.

Opinion by Assistant Attorney General Linda C. Breland

Dear Mr. Miele:

This is in response to your request for an opinion from this office regarding service on public library boards by city or county officials. Specifically, you ask the following questions:

- “(1) Is it legal for a mayor, a member of a city or town council, or any other elected or appointed municipal official, to serve as a member of a public library board created for his or her city or town under Sections 11-90-1 through 11-90-3 of the **Code of Alabama 1975**? Does Section 11-43-53 of the **Code** have any bearing upon such service?
- “(2) Is it legal for a judge of probate, a member of a county commission, or any other elected or appointed county official to serve as a member of a county library board established for his or her county under Sections 11-90-1 through 11-90-3 of the **Code of Alabama 1975**?
- “(3) Is it legal for an elected or appointed municipal or county official to serve as a member of a joint library board established in whole or in part to provide service to his or her municipality or county under Section 11-90-4 of the **Code of Alabama 1975**?”

The answer to all of these questions is in the affirmative. **Code of Alabama 1975**, §11-90-3, which provides for the composition, appointment and terms of office of library board members, places no restrictions upon whom may serve as board members. This section does provide that members of the library board shall serve without compensation. Because the library board members serve without compensation, their positions would not be considered “offices of profit.” Further, I can see no conflict of interest such as is prohibited by §11-43-53 and §41-16-60, **Code of Alabama 1975**.

Therefore, it is my opinion that any elected or appointed municipal or county official may serve on a county or joint library board. I

trust that I have answered your questions sufficiently.

Sincerely,

CHARLES A. GRADDICK
Attorney General

January 22, 1980

Honorable Louis C. Rutland
Attorney, Bullock County Commission
P. O. Box 108
Union Springs, Alabama 36089

Funds—Highways and Bridges—Bullock County

A county commission may construct and maintain streets within the corporate limits of a municipality.

Opinion by Assistant Attorney General Patrick L. Robinson

Dear Sir:

In a recent letter to this office, you requested an opinion regarding the propriety of a county commission working on streets within the corporate limits of a municipality. In this regard, please see Section 23-1-86 and Section 40-17-79, **Code of Alabama 1975**. Section 23-1-86, *supra*, reads as follows:

"The county commission of any county, with the consent or permission of the city council or governing body of any municipality, may establish, construct and maintain any road, street or bridge within the corporate limits of such municipality except in cases where the Highway Department had jurisdiction over such road, street, or bridge."

Section 40-17-79, *supra*, reads as follows:

"The county commission of each of the counties is hereby authorized to use or expend the proceeds of the state gasoline tax levied by Section 40-17-31, distributed to such county pursuant to this division, for the construction and maintenance of streets within the corporate limits of any municipality located within such county, anything in Sections 40-17-30 through 40-17-52 to the contrary notwithstanding."

It is my opinion that a county commission may make a grant of money to a city for the purposes outlined in the above statutes. A contract should be entered into between the county commission and the city to insure that the funds provided by the county commission are spent for the purposes outlined in the above statutes. It is also my opinion that a county commission may pay a contractor for work already

completed under a contract with a city provided that the city certifies that the debt is a lawful obligation of the city for street work.

If I may be of any further assistance to you regarding this matter, please do not hesitate to contact me.

Very truly yours,

CHARLES A. GRADDICK
Attorney General

February 7, 1980

Honorable Ken Malone
Tax Assessor

P. O. Box 2925
Mobile, Alabama 36601

Mobile County—Ad Valorem Tax—Homestead—Exemptions
The homestead exemption is an attribute of the land, only one homestead exists for each contiguous parcel of property. The owner of an undivided fractional interest is liable for that fractional proportion of the ad valorem taxes and is entitled to that fractional proportion of the homestead exemption provided he uses the property for his home.

Opinion by Assistant Attorney General Davis.

Dear Mr. Malone:

In your letter of December 13, 1979, you request an opinion of this office regarding the effects of joint ownership upon the application of the exemptions provided in **Code of Alabama 1975**, §§40-9-19 and 40-9-21, as follows:

- (1) An owner has an undivided one-half interest in a house and four lots, resides in the house and is over 65 years of age with an income under \$7,500. Does the exemption of Act 48, now **Code of Alabama 1975**, Section 40-9-21 apply?
- (2) Where there are multiple heirs, and therefore multiple joint tenants or owners and one of the owners claims the homestead exemption under **Code of Alabama 1975**, Section 40-9-19 (a) and (b).
 - (a) Is the claimant entitled to all of the exemption (\$2,000.00) or to his fractional share of the exemptions? And,
 - (b) If the claimant is over 65, or retired due to permanent and total disability or is blind, to what extent is the exemption afforded? And,

(c) In either (a) or (b), if the claimant is entitled to only his share of the property under the exemption, is the balance to be assessed to the other owners as Class II under **Code of Alabama 1975**, Section 40-8-1 and Amendment 373 to the Constitution of 1901?

The answer to question one is yes.

The answer to question (2)(a) is that an owner who resides upon the property may claim his fractional share of the allotted homestead against the taxes upon his fractional share of the property.

The answer to question (2)(b) is that an owner who resides on the property and is over 65, or retired due to total and permanent disability or is blind, is exempt under **Code of Alabama 1975**, Section 40-9-19(a) from the payment of state ad valorem taxes upon his fractional share of the property and may claim his fractional share of the \$5,000 homestead provided in **Code of Alabama 1975**, Section 40-9-19(b) against his fractional share of the property.

The answer to question 2(c) is that the property should be assessed against each of the co-tenants for his fractional interest, with the homestead exemption being applied, in appropriate fractional parts against the assessment of any of the co-tenants who actually reside upon the property. The rate of assessment is that of Class III under Amendment 373 of the 1901 Constitution if the property is used as a residence by one of the owners.

The homestead is "an artificial estate in land devised to protect the possession and enjoyment of the owners against the claims of his creditors, by withdrawing the property from execution and forced sale so long as the land is occupied as a house." **Blacks Law Dictionary**, Revised 4th Edition, Page 866. The Constitution and laws of the State of Alabama extend this protection to include withdrawing the property, to the extent of the exemption, from the levy of ad valorem taxes.

The homestead exemption, both as to levy and sale by creditors and as to levy for ad valorem taxes is an attribute of the land, not a right of the taxpayer, and accordingly, only one homestead exists for each contiguous parcel of property. (Artificial division of the homestead property by land lines, lot lines, roads and the like, or for convenience in assessment or otherwise, has no bearing upon the application of the exemption). Thus under 40-9-19(a), *supra*, there is a basic homestead exemption from state ad valorem taxes to the extent of up to \$2,000.00 in assessed value or 160 acres in area, which is extended in the case of persons over 65 or disabled as provided, or blind as provided, to an unlimited amount (as homestead, as defined by the Constitution and laws of Alabama) but not to exceed the value of the interest owned. Similarly under §40-9-1(b) *supra*, except that the extension for those over 65, etc., is limited to \$5,000.00 in assessed value. See Quarterly Report of the Attorney General Volume 8, pages 19, 66 and 267, and Volume 176, page — addressed to Ralph P. Eagerton, Jr. and dated August 29, 1979.

The owner of an entirety of the estate although less than a fee, as the owner of a life estate, is entitled to the entire exemption as there are no fractional interests, and the remaindermen, although residing upon the property, cannot share in an exemption, and, by the same token, are not liable for the tax

The owner of an undivided fractional interest is liable for that fractional proportion of the tax and is entitled to that fractional proportion of the exemption provided he uses the property for his home.

The exemption under **Code of Alabama 1975**, §40-9-21 is not a homestead exemption. The principle residence, owned (whether the entire fee or something less than the fee) and occupied by a person totally disabled or 65 years of age or older who has an income under \$7,500 is exempt from the levy of ad valorem taxes.

I trust the foregoing answers your questions.

Sincerely,

CHARLES A. GRADDICK
Attorney General

February 7, 1980

Honorable G. William Noble, Mayor
City of Gardendale
P. O. Box 38
Gardendale, Alabama 35071

Municipalities — Planning and Zoning Commission —
Regulations

Only governing body may pass zoning ordinances.

Opinion by Assistant Attorney General Carol Jean Smith

Dear Mayor Noble:

This office has received the opinion request of the City of Gardendale. Your first question is:

"May the planning and Zoning Commission, or a sub-committee thereof of the City of Gardendale regulate the type of construction, location, and appearance of metal constructed buildings within the City even though the said metal constructed buildings conform with the Building Code in all other respects?"

This question must be answered in the negative. The Planning and Zoning Commission must, of course, adopt a master plan and a zoning plan. **Code of Alabama 1975**, §11-52-8. And the zoning plan must be

submitted to the governing body of the municipality before action can be taken. However, only the governing body of the municipality may enact zoning ordinances and it need not follow the recommendation presented. **Code of Alabama 1975**, §11-52-79. It is clear that the nature of the regulation to which you refer is "zoning" rather than "planning" and that such regulation could only be the result of a zoning ordinance enacted by the governing body. See **Roberson v. City of Montgomery**, 285 Ala. 421, 233 So.2d 69 (1970).

Thus, it is necessary to answer your second question which is whether the City Council may, through a properly adopted ordinance, regulate the construction, location and appearance of metal constructed buildings within the City in all zoning districts. This inquiry may be generally answered in the affirmative. In availing itself of the power to zone, the governing body of the municipality has not only the power to regulate location by the establishment of zoning districts, but to the extent provided in **Code of Alabama 1975**, §§ 11-52-72 and 11-53-73 may regulate the construction and appearance of buildings within those districts. It must be noted, however, that under **Code of Alabama 1975**, §11-52-71 all regulations shall be uniform for each class or kind of buildings throughout the district, but the regulations in any one district may differ from those in other districts.

I do hope that this response fully answers your inquiry. If, however, we may be of further assistance, please do not hesitate to contact us.

Sincerely yours,

CHARLES A. GRADDICK
Attorney General

February 7, 1980

Honorable Levi Watkins
President,

Alabama State University
Montgomery, Alabama 36101

Colleges and Universities—Garnishment—Employees and
Employment

Salaries of employees of Alabama State University are sub-
ject to garnishment.

Opinion by Assistant Attorney General Knight.

Dear Dr. Watkins:

Reference is made to your request for an opinion from the Attorney General as to the following matter:

"Alabama State University has received Writs of Garnishment for some of its employees. Please give us a legal opinion as to what the legal responsibilities of the University are as relates to this subject."

Alabama State University is a state instrumentality and therefore, immune from suit. Its officers and employees when acting in their official capacity are also immune from suit when a result favorable to the plaintiff or complainant would directly affect a contract or property right of the state. *Southall v. Stricos Corporation*, 275 Ala. 156, 153 So. 2d 234 (1963). However, the Supreme Court of Alabama concluded in a recent case that this immunity does not prohibit garnishment of a state employee's salary. *Druid City Hospital v. Epperson, et al*, No. 78-482, 14 ABR 270 (Dec. 7, 1979).

Code of Alabama 1975, Section 6-6-480 through Section 6-6-484 provides for the garnishment of the salaries of public officers and employees. In its ruling in *Druid City Hospital v. Epperson, et al*, *supra* the Court said that garnishment of public employees' and officers' salaries does not violate the constitutional provisions against the State being made a defendant in a legal action. The Court went on to say that Section 6-6-480 restricts the remedy to the officer's and employee's salary and does not necessarily implicate the property or contract rights of the state.

Section 6-6-483 states that a judgment of garnishment cannot be entered unless the agent of the state entered on the answer to the garnishment gives his assent and consent to said judgment. The Supreme Court in *Druid City Hospital v. Epperson, et al*, *supra* concluded that the state official may refuse assent and consent only for "good and reasonable cause," and that administrative inconvenience is not a "good and reasonable cause" for denying "assent and consent" to a garnishment judgment. Considering the Court's ruling in this above discussed case, it is the opinion of the Attorney General that the salaries of the employees of Alabama State University in question are subject to garnishment.

The garnishment writ requires the garnishee, (Alabama State University) to appear within thirty (30) days and file a written answer under oath with the court. **Code of Alabama 1975**, Section 6-6-393. In the answer, the garnishee must indicate all indebtedness to the defendant (the employee) whether existing or future, under an existing contract. The nature and the amount of the indebtedness must also be described in the answer. A judgment will be rendered against the University for the amount necessary to satisfy the claim against the employee. The garnishee pays the money into the court to satisfy the judgment.

If our office can be of further assistance, please do not hesitate to call on us.

Sincerely,
CHARLES A. GRADDICK
Attorney General

February 13, 1980

Hon. William A. Short, Jr.
District Attorney
Courthouse
Bessemer, Alabama 35020

Extradition—Prisons and Prisoners—Expenses

State requesting extradition of fugitive must pay costs, fees, and expenses incurred.

Opinion by Assistant Attorney General Solomon

Dear Mr. Short:

This office is in receipt of your recent letter requesting our opinion as follows:

"We have run into an unusual expense involving the extradition of [a] prisoner and are very much in need of an opinion from your office as to whether or not this expense is covered under provisions of Title 15, 9-65.

"In October of 1979 we forwarded certified documents to Texas in an effort to apprehend and extradite the above noted fugitive. The State of Texas subsequently arrested and incarcerated this subject and held him for our office to obtain the Governor's Warrant for extradition. During his incarceration he became ill and was hospitalized in the County of Hardeman at Quanah, Texas and incurred a hospital expense of \$1,287.40. They have submitted this bill to us for payment. Hardeman County was holding this subject for us, with no local charges."

Section 15-9-62, **Code of Alabama 1975**, states in pertinent part as follows:

"When the punishment of the crime shall be the confinement of the criminal in the penitentiary or death, the expenses incurred in bringing an accused back to the state of Alabama shall be paid out of the state treasury, on the certificate of the governor and warrant of the comptroller. In all other cases, they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. . . . **There shall also be allowed the fees paid to the officers of the state on whose governor the requisition is made.**" (Emphasis Supplied.)

Section 15-9-65, **Code of Alabama 1975**, which is referred to in your request, applies to situations involving a return of fugitives where the fugitive consents to return with the sheriff without requisition by the governor. The authorization for the payment of fees is similar to that contained in Section 15-9-62.

In addition to the state law cited above, there are United States

laws dealing with the extradition of fugitives from state to state and nation to nation. The applicable section concerning fees is found in the **United States Code**, 18 USC §3195, which in pertinent part states:

"All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority."

Based on the foregoing it is the opinion of this office that the state demanding the return of a fugitive should pay the costs and expenses incident to the apprehending, securing, and returning of the fugitive. Thus, the State of Texas is entitled to be paid the fees and expenses its officers incurred in apprehending and securing the fugitive and for the medical expenses incurred in treating the fugitive. If the offense for which the fugitive is charged is punishable by confinement in the penitentiary or death, such expenses are to be borne by the state and paid out of the State Treasury on the certificate of the Governor and warrant of the Comptroller. In all other cases payment shall be made out of the county treasury in the county where the crime is alleged to have been committed.

This office has in the past issued an opinion that this state is entitled to the payment of such fees and expenses when a request for the return of a fugitive is made from a sister state. See opinion to Hon. W. H. Holcombe, dated February 2, 1946, Vol. 42, p. 37, Quarterly Report of the Attorney General. Under the law and in fairness and equity to our sister states we must follow the same rules when this state is the demanding state that we require of our sister states when they request the return of a fugitive from Alabama.

I hope this satisfactorily answers your question.

Sincerely,

CHARLES A. GRADDICK
Attorney General

February 13, 1980

Honorable Allen L. Tapley
Administrative Director of Courts
Administrative Office of Courts
817 South Court Street
Montgomery, Alabama 36130

Alabama Criminal Code—Fines—Crimes and Offenses

Offenses classified under criminal code as violations should be treated the same as misdemeanors for court finance purposes.

Opinion by Assistant Attorney General Solomon

Dear Mr. Tapley:

This office is in receipt of your inquiry of whether offenses classified as "violations" are to be treated the same as misdemeanors for court finance purposes, because the term of imprisonment which may be imposed for misdemeanor offenses also encompasses the sentence provided for offenses defined as "violations?" You further ask if this is not the case, what is the appropriate docket fee to be charged and how should it be distributed?

The new criminal code which became effective January 1, 1980, contains the following definition of offenses in Section 13A-1-2, **Code of Alabama 1975**, in pertinent part as follows:

"Unless different meanings are expressly specified in subsequent provisions of this title, the following terms have the following meanings:

(1) **OFFENSE.** Conduct for which a sentence to a term of imprisonment, or the death penalty, or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state.

(2) **VIOLATION.** An offense for which a sentence to a term of imprisonment not in excess of 30 days may be imposed.

(3) **MISDEMEANOR.** An offense for which a sentence to a term of imprisonment not in excess of one year may be imposed.

(4) **FELONY.** An offense for which a sentence to a term of imprisonment in excess of one year is authorized by this title."

A review of the **Alabama Code 1975** reveals no provision establishing the amount of docket fees to be charged for offenses classified as "violations." However, since the punishment imposed for a "violation" is included within the maximum punishment for a misdemeanor, for which there are provisions for docket fees, the docket fees to be charged for violations should be the same as those charged for misdemeanors. Docket fees collected for violations should be distributed in the same manner as those for misdemeanors.

If we can be of further assistance, please contact us.

Sincerely yours,

CHARLES A. GRADDICK
Attorney General

February 15, 1980

Honorable Ken Malone
Tax Assessor
Mobile County

P. O. Box 2925
Mobile, Alabama 36601

Taxation—Ad Valorem—Boats

Code of Alabama 1975, §40-11-1(3) imposes ad valorem tax only upon commercial vessels.

Opinion by Assistant Attorney General Davis.

Dear Mr. Malone:

You have requested of this office an opinion respecting the following matter:

"Does **Code of Alabama 1975, §40-11-1(3)** impose an ad valorem tax on commercial vessels only, or is it intended to encompass both commercial and pleasure craft?"

Code of Alabama 1975, §40-11-1(3) provides:

"All steamboats, barges, vessels and watercraft of every name and kind however propelled, plying waters of this state, and the owner thereof shall return same for taxation to the assessors in the county wherein he resides; and, if such steamboat, barge, vessel or watercraft is owned by a corporation, then in that county where its principal office is located; in the case of the owner's being an individual not residing in this state or being a corporation with no principal office in this state, then in the county or counties where used; all such steamboats, barges, vessels or watercraft whether owned by a resident or nonresident of this state, which have acquired a permanent situs in this state. All transfer boats, steamboats or barges used by any railroad in transferring cars and passengers must be assessed and taxed in the county or counties where used, or where the owner resides, regardless of where such vessel may be registered," (Emphasis supplied).

Another statute which has bearing upon the question is **Code of Alabama 1975, §§33-5-3(1) and (2) and 33-5-9** which provide for registration of vessels, as follows:

§33-5-3.

"(1) VESSEL. Every description of watercraft, other than a seaplane, capable of being used as a means of transportation on the water, but such term shall not include vessels 12 feet in length or less when used solely on farm ponds of less than 50 acres in size.

"(2) WATERS OF THIS STATE. Any waters within the territorial limits of this state and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to and from the shore of this state; provided, however, that 'waters of this state' shall not be interpreted to mean any private pond which is not used for boat rentals or the charging of fees for fishing therein."

§33-5-9.

"Every vessel on the waters of this state shall be registered and numbered. No person shall operate or give permission for the operation of any vessel on such waters unless the vessel is registered and numbered with the identifying number set forth in the certificate of registration displayed on each side of the bow of such vessel, or in accordance with applicable federal law or in accordance with a federally approved numbering system of another state, and unless the certificate number awarded to such vessel is in full force and effect."

There are several rules of statutory construction which provide guidance in considering questions of this nature. First, all taxing statutes are construed strictly against the taxing power and liberally in favor of the taxpayer. **Smith v. Pullman, Inc.**, 280 Ala. 295, 193 So. 2d 516 (1966); **State v. GM&O Land Co.**, 49 Ala. App. 707, 275 So. 2d 689, cert. den. 275 So. 2d 690 (1973); **Boswell v. Abex Corp.**, 55 Ala. App. 477, 317 So. 2d 314, cert. den. 317 So. 2d 317 (1975); **State v. Alabama Leasing Co.**, 336 So. 2d 1353, on remand 336 So. 2d 1336 (1978).

Second, is the ancient doctrine of "ejusdem generis," i.e., where general words in a statute follow enumeration of particular classes of things the general words will be construed as applicable only to things of the same general nature or class as those enumerated. **Ross Jewelers v. State**, 260 Ala. 682, 72 So. 2d 402, 43 ALR 2d 351.

Third is the rule that when a tax statute has been construed by the highest officials charged with the duty of administering the tax laws, such construction is to be given favorable consideration, especially if unchallenged for a considerable time, and this rule increases in weight when the statute is reenacted or amended without altering the effect of such an administrative interpretation. **East Brewton Materials, Inc. v. State**, 45 Ala. App. 584, 233 So. 2d 751 (1970); **Alabama Precast Products v. Boswell**, 357 So. 2d 981; affirmed 357 So. 2d 985 (1977); **International Union of Operating Engineers v. Water Works Board**, 276 Ala. 462, 163 So. 2d 619 (1964).

Fourth is the general rule that words in a statute will be given the meaning generally accepted in popular everyday usage. **Morgan County Commission v. Powell**, 292 Ala. 300, 293 So. 2d 830 (1974).

Applying these rules to the statute in question, **Code**, *supra*, §40-11-1(3), particularly in view of the provisions of **Code**, *supra*,

§33-3-9 it is clear that the tax is imposed upon commercial vessels plying the waters of the state, and not upon the miscellaneous pleasure boats privately owned by the citizens of that state.

The taxing statute lists "steamboats, barges, vessels and watercraft, of every name and kind, however propelled, plying the waters of this state" as subjects of taxation. In general steamboats and barges are considered to be commercial vessels, and this general concept is supported by the meaning of the verb "to ply" i.e., to make a practice or **business** of rowing or sailing over or on; to go or travel regularly. Plying is a nautical term defined by Webster as "to make regular trips." It implies regularity. **Words and Phrases**, Volume 32A, pages 343 and 344. In addition the statute is careful to cover ownership by an out of state individual or a corporation with no principal office in the state of a vessel used in the state. Further, "transfer boats" used by railroads are also specified.

When the taxing statute is contrasted with the registration statute, it is clear that the registration statute is much broader in scope. Accordingly a watercraft vessel or boat vehicle may be subject to the registration requirements, is not thereby brought within the scope of the taxing statute.

Inquiry reveals that over the years the tax assessors and collectors of the several counties of the state have routinely required return of and payment of taxes for commercial vessels, but not of and for pleasure or recreational boats or vessels. In the meantime the statute has been amended four times in the 45 years since enactment of the general revenue code.

To summarize: the general meaning of the words which head the list in **Code**, supra, §40-11-1(3), includes the concept of commercial as opposed to recreational use, which concept is further supported by the use of the nautical term "plying the waters" and the careful inclusion in the statute of ownerships which are clearly commercial in nature. Thus, the doctrine of "ejusdem generis" and the rule of construction that taxing statutes are construed strictly against the taxing power and liberally in favor of the person who may be subject to the tax, coupled with the long-standing interpretation of the taxing authorities charged with the duty of administering the tax that it applies only to commercial vessels, compels the conclusion that the tax applies only to commercial vessels. This conclusion is further supported by the implied ratification of this interpretation by the legislature in amending the statute on several occasions, but leaving the interpretation intact.

I trust that the foregoing answers your question.

Yours very truly,

CHARLES A. GRADDICK
Attorney General

March 5, 1980

Honorable S. Wayne Fuller

Attorney at Law

Cullman Professional Building

413 First Avenue, S.W.

Cullman, Alabama 35055

Counties, Hospital Boards, and Funds

Under Alabama Constitution of 1901, Article IV, §94, Public hospitals cannot pay for an awards banquet for hospital volunteers and cannot guarantee loans made to indigent patients by financial institutions.

Opinion by Assistant Attorney General Gibbs

Dear Mr. Fuller:

This office has received your opinion request of January 11, 1980 in which you asked whether the Cullman County Hospital Board can pay for a banquet for hospital volunteers and whether the Board can guarantee loans made to indigent patients by a local bank. The answers to your questions are set out below.

As to your first question, the Cullman County Hospital Board may not pay the cost of an appreciation or awards banquet for hospital volunteers such as you describe. **Alabama Constitution of 1901**, Art. IV §94 prohibits public hospitals from granting public money or any other thing of value to any individual or association. A banquet such as you describe would necessarily involve a grant of this nature.

As to your second question, the Cullman County Hospital Board may not enter into a financing arrangement such as you describe. Such a plan, where the hospital guarantees payment of a loan made to a patient who would otherwise not be eligible for such a loan, amounts to lending the credit of the hospital to a patient and is also prohibited by **Alabama Constitution of 1901**, Art. IV §94. A public hospital which desires to provide care for indigents should use the mechanism established in the **Alabama Constitution of 1901**, Amendment 125.

I hope this fully answers your questions. If this office can be of any further assistance, please do not hesitate to contact us.

Very truly yours,

CHARLES A. GRADDICK

Attorney General

March 10, 1980

Honorable Larry D. Dixon

House of Representatives

Montgomery, Alabama 36130

Cosmetology Board—Licenses

Retail clerks who only occasionally apply cosmetic preparations to customers are exempt from the Cosmetology Act.

Opinion by Assistant Attorney General Brannan.

Dear Mr. Dixon:

I am in receipt of your letter which posed the questions:

- "1) A retail clerk must apply cosmetic preparations to a portion of a customer's body in a continuous, regular and daily manner as part of his or her regular duties in order to fall within the definition of a "cosmetologist" found at §34-7-1(2) (Code of AL, 1975), and therefore subject to the licensing provisions of the Alabama Cosmetology Act?
- 2) Can a person or corporation be convicted and punished under the Penalty Provision of the Alabama Cosmetology Act, found at §34-7-25 (Code of AL, 1975), assuming that such person is a retail clerk who has never affirmatively represented to the public, either orally or in writing, that he or she is a registered cosmetologist, but who does occasionally apply cosmetic preparations on the body of a customer in the course of selling such customer cosmetic preparations?
- 3) Does the Exemption Section of the Alabama Cosmetology Act, found at §34-7-24 of the Code of AL, apply to retail clerks who do not affirmatively hold themselves out to the public as being registered cosmetologists and who only occasionally apply cosmetic preparations to the bodies of retail customers?"

The answers to your questions are as follows:

1. Yes. A retail clerk must be licensed as a demonstrator when he demonstrates a cosmetic preparation by applying it upon the hair or body of another person. **Code of Alabama 1975, §34-7-1(12)**. However, the licensure requirement applies only when the demonstrator does something more than "occasionally" demonstrate a cosmetic preparation. We see this distinction as between retail clerks in a department store or drug store and demonstrators in a cosmetic studio such as Merle Norman or Avon.
2. No. §34-7-25 applies to persons who are practicing cosmetology without a license. A retail clerk who does not do more than "occasionally" demonstrate a cosmetic preparation on a customer is not required to be licensed by the Act.
3. Yes. Those retail clerks are exempted by §34-7-24, **Code**.

It is our opinion that the Cosmetology Act exempts "any person who only occasionally dresses hair or does any other act or thing mentioned" in the definition of cosmetology when that person does

not hold himself out to the public as a practicing cosmetologist. **Code of Alabama 1975, §34-7-24.** If a clerk applies cosmetics more than occasionally she would be required to buy a license.

I hope that we have sufficiently answered your questions. Please let us know if we can be of further assistance.

Sincerely,

CHARLES A. GRADDICK
Attorney General

March 10, 1980

Honorable R. Forrest Dobbins
Calhoun Circuit Court Clerk
P.O. Box 1530
Anniston, Alabama 36202

Courts—Costs and Fees—Circuit Clerks

Sureties are not liable for court costs and fines assessed against defendant upon forfeiture of bond.

Opinion by Assistant Attorney General Knight

Dear Mr. Dobbins:

The Attorney General received your request for an opinion as to the following matter:

"Recently the Calhoun Circuit Court Clerk issued a Writ of Execution (in a Final Bond Forfeiture-State Criminal Case) in sum of \$2500.00 (bond) plus \$15.00 costs incident to forfeiture. The Sheriff collected \$2500.00 from the Professional Bonding Co. but did not collect the costs incident to Forfeiture, and the Sheriff returned the Writ to the Clerk with \$2500.00.

"The Clerk reissued said Writ for collection of the costs incident to said Forfeiture; the Sheriff returned Writ with no further entry thereon.

"The Sheriff has questioned the presiding Judge of this Circuit on Clerk's authority to include costs incident to Forfeiture in Writ of Execution (Note: such costs is not costs in original case . . .).

"1. Please advise this Clerk instantler if a Judgment of Bond Forfeiture **also includes costs incident to the Forfeiture.** (and if same is assessed against defendant and Surety (ies))."

Your question is to be answered in the negative.

The Supreme Court of Alabama ruled in **Ex Parte City of Russellville**, 246 Ala. 130, 19 So. 2d 106 that when an accused fails to appear within fifteen (15) days after the dismissal of an appeal from a judgment of conviction and the undertaking of bail is forfeited and a conditional judgment is rendered against the sureties, there is a forfeiture of bail, but the sureties thereon are not liable to judgment for fines assessed against the accused or the costs incident to the trial or appeal.

Therefore, a judgment of bond forfeiture does not include the cost incident to the forfeiture or trial and these cannot be assessed against the sureties on the bond. Such costs can be assessed against the defendant personally.

If our office can be of further assistance, please do not hesitate to call on us.

Sincerely,

CHARLES A. GRADDICK
Attorney General

March 18, 1980

Honorable Charles L. Murphree
Attorney for City of Hartselle
P. O. Box 1727
Decatur, Alabama 35602

Municipality—Licenses—Architects

A municipality may not require a non-resident architect who is licensed to practice by another municipality to obtain a license to do business within its municipal limits and police jurisdiction.

Opinion by Assistant Attorney General Brannan

Dear Gentlemen:

This opinion is written to give reconsideration to the opinion previously issued to you on December 14, 1979. The opinion is being reconsidered after much legal research, thought, and study by personnel of this office.

The City of Hartselle has passed a Resolution requesting an opinion from this office concerning whether a non-resident architect licensed to do business by another municipality may be required by the City of Hartselle to obtain a license from Hartselle in order to render professional services within the municipal limits of the City of Hartselle. We have been unable to assume, as you requested, that the architectural services rendered were actually performed within the city limits of

Hartselle. Because of the very nature of the practice of architecture we have been unable to assume that the architectural services actually rendered were sufficient in quantity or longevity to establish a nexus with Hartselle. After reconsideration it is the opinion of this office that the City of Hartselle may not require an architect to obtain a license to render professional services within the corporate limits of the City of Hartselle when he is licensed to render such services by another municipality.

The nature of the practice of architecture removes that profession from the provisions of Chapter 9 of the **Hartselle Code** which require that all persons who are engaged in any profession or occupation within the corporate limits of the City of Hartselle obtain a license to "do business" within the city. The practice of architecture involves the preparation of plans, sketches and designs for the construction or erection of a building or structure. Architectural services are sought when expert knowledge or skill is necessary in planning the construction of a building. While an architect may observe or supervise the actual construction of the building, such supervision or observation constitutes only a small percentage of the architectural service.

Cases relevant to this issue have been heard in other states and have held that the supervision or observation stage is not a necessary function of the architectural service. As the court wrote in **Arkansas State Board of Architecture v. Bank Building and Equipment Company**, 286 S.W. 2d 323:

"Primarily, an architect is a person who plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge or skill are required in such preparation."

It is for this reason that we are unable to assume, even for the purposes of this opinion, that an architect who has formulated a design or plan for the construction of a building in Hartselle has established a nexus with Hartselle which is sufficient to necessitate licensure to do business. Unless the architect has established a business within the city, Hartselle cannot require him to obtain a license to do business within its municipal limits.

This rule complies with constitutional mandates. In **West Point Wholesale Grocery Co. v. City of Opelika** (1957), 77 S.Ct. 1096, 354 U.S. 390, 1 L.Ed.2d 1420, a city ordinance imposed a fixed-sum license tax on wholesale grocers who unloaded, delivered, or distributed in the city groceries transported from points outside of the city. The United States Supreme Court held that under the Commerce Clause a city could not impose a flat-sum privilege tax on out-of-city wholesale grocers whose only contact with the city was the solicitation of orders and the subsequent delivery of goods in the city. This case might also apply to a situation like we have here where architectural services have been rendered outside the City of Hartselle.

Finally, it should be noted that statutes imposing license taxes are strictly construed against the state or taxing power. *State v. Dr. Pepper Bottling Co.* (1934), 26 Ala. App. 125, 155 So. 92, cert. den. 155 So. 93, 228 Ala. 607; *Carruth v. State* (1931), 24 Ala. App. 158, 132 So. 65. In *State v. Dr. Pepper*, supra, the court said:

" . . . In construing statutes of this character, resort to the well-established rule that a strict construction is always employed against the state or taxing power and in favor of the taxpayer, and that license statutes must be confined to the strict letter of their language and their application cannot be enlarged by implication or inference, and, further, that every doubt must be resolved in favor of the taxpayer, and, where the language is susceptible of two constructions, that most favorable to the taxpayer must be adopted. It must show a plain intent to include the particular licenses within its term. [Citing Cases]."

It is therefore our opinion that a municipal license tax cannot be imposed on an out-of-city architectural firm for a single project where no offices are located within the city and no facts sufficient to establish a nexus with the municipality have been shown. The opinion issued on December 14, 1979 is hereby revoked and overruled by this opinion.

Sincerely,

CHARLES A. GRADDICK
Attorney General

March 19, 1980

Representative Hugh Boles
1036 Normandie Circle
Hueytown, Alabama 35020

Education—County and City Boards of Education

Proper use of funds to replace school fees appropriated under Act No. 79-458 of the Alabama Legislature discussed.

Opinion by Assistant Attorney General Hamlett.

Dear Representative Boles:

We have considered your request for an opinion concerning the proper allocation and use of the line itemed "Funds to Replace School Fees" appropriated by the Alabama Legislature in Act No. 79-458, the "Education Appropriation Act of 1979". As you note in your request the Legislature has since 1975 appropriated similar sums for the replacement of school fees. In all previous appropriation acts the

Legislature has defined with some preciseness how this money was to be allocated, budgeted and spent. Some of the directory language previously used was deleted and not included in Act No. 79-485. This language was deleted because of a ruling of the Speaker of the House that such language in an appropriation bill was constitutionally inappropriate.

Under the Appropriations Acts passed prior to Act No. 79-485 the Legislature directed that this money be used for the purchase of instructional supplies, materials and equipment, excluding furniture and fixtures. It was further directed by the Legislature that at least one half of the allotment for each teacher unit be made available for each classroom teacher for materials and supplies for that teacher's students. This requirement could be waived by each individual teacher.

Further, under the previous acts, it was required that each faculty member be given the opportunity for input into deciding how the money allocated for all teacher units at each school would be spent. This budget had to be cooperatively developed by the faculty and principal cooperatively.

It is clear under the provisions of this previous appropriations acts that the money appropriated to replace school fees was intended to provide direct financial aid for classroom teachers in the purchase of instructional materials for the direct benefit of the children in this respective classrooms. The appropriation was specifically limited to provide for those items relating directly to classroom instruction and not to provide materials, supplies or equipment relating to the administrative, maintenance or other functions necessary to the operation of the public schools. Nor does the legislative intent of these previous acts appear to include the purchase of library books for general library rather than classroom use.

In apparent recognition of this fact, the State Board of Education has adopted specific Regulations pertaining to the allocation and expenditure of the "Funds to Replace School Fees." These Regulations incorporate the wording and intent of the previous Appropriations Act and further require that local boards may not withhold these funds from the individual schools and must notify the professional staff of each school of the availability of these funds. These funds are available to all teachers except Federal program teachers.

Based on the foregoing, it is the opinion of this office that this appropriation must continue to be expended in the same manner and for the same purposes as the funds were used prior to the deletion of the specific language regarding their expenditures from the appropriations bill. These funds must continue to be used in this manner until the Legislature gives it clear and unambiguous intent to the contrary.

I trust that I have answered your question sufficiently.

Sincerely,
CHARLES A. GRADDICK
Attorney General

March 19, 1980

Honorable David H. Williams

Executive Director

Board of Pardons and Paroles

750 Washington Avenue

Suite 312

Montgomery, Alabama 36130

Pardons and Paroles Board—Prisons and Prisoners

A delinquent parolee who is in custody awaiting a revocation hearing may not be discharged prior to that hearing.

A parolee's time served toward completion of his sentence stops running when he is arrested as a delinquent parolee.

Opinion by Assistant Attorney General Breland.

Dear Mr. Williams:

This is in response to your request for an opinion from this office of December 4, 1979, in which you ask the following questions:

- "1. May a delinquent parolee who is in custody awaiting a parole court (revocation hearing) be discharged from custody without official action by the Board of Pardons and Paroles as having completed his sentence?
- "2. If the answer to question number one is affirmative, how is the discharge date calculated?"

In answer to your questions, it is my opinion that a delinquent parolee who is in custody awaiting a hearing may not be discharged until he has had a delinquency hearing before the Parole Board, and the Board has taken official action to discharge him. As you are aware, **Code of Alabama 1975**, Section 15-22-32 provides as follows:

"Whenever there is reasonable cause to believe that a prisoner who has been paroled has violated his parole, the board of pardons and paroles, at its next meeting, shall declare such prisoner to be delinquent, and time owed shall date from such delinquency. The warden of each prison shall promptly notify the board of the return of a paroled prisoner charged with violation of his parole. Thereupon, such board shall, as soon as practicable, hold a parole court at such prison or such other place as it may determine and consider the case of such parole violator, who shall be given an opportunity to appear personally or by counsel before such board and produce witnesses and explain the charges made against him. The board shall, within a reasonable time, act upon such charges and may, if it sees fit, require such prisoner to serve out in prison the balance of

the term for which he was originally sentenced, calculated from the date of delinquency or such part thereof as it may determine; however, the delinquent parolee shall be deemed to have begun serving the balance of the time so required on the date of his rearrest as a delinquent parolee."

This section states that the Parole Board, at the revocation hearing, may require a prisoner to serve out the balance of the term for which he was originally sentenced. This means that the Board could, in effect, revoke any good time credit that the parolee had accumulated. Clearly, if a parolee being held for a revocation hearing is released prior to the hearing at the expiration of an early release date, such release will circumvent the authority granted to the Board under Section 15-22-32 to require a prisoner to serve out the remainder of his sentence in full. Such a result surely was not intended by the legislature.

Federal and state courts have held that when a parolee is declared delinquent, such declaration acts as an "interlocutory revocation of parole," which means that the parolee's time stops running until there is a revocation hearing and a decision by the Parole Board on whether to revoke parole. *Tunstill v. State*, 41 Ala. App. 516, 138 So.2d 267 (1962); *Ivy v. State*, 381 F. Supp. 503 (S. D. Ala. 1974).

Based on these cases, a parolee's time cannot expire during the period that he is awaiting a delinquency hearing because the time stops running when he is declared delinquent. As soon as the Parole Board holds a hearing on the delinquency charge, the Board may require the prisoner to serve out the balance of his original sentence. Pursuant to Section 15-22-32, this balance would be calculated from the date upon which the delinquent parolee was rearrested as a parole violator.

The Parole Board may also find that the prisoner was not delinquent and may, pursuant to **Code of Alabama 1975**, reinstate him to parole. In this situation, the prisoner would be deemed to have had continuous service during the time he was held as a delinquent.

It should be noted that if a delinquent parolee is being held in jail on another charge in another state, the balance of his time would not begin to run until the date that he is released to custody of the Alabama Board of Corrections on the fugitive warrant issued as a result of his parole violation.

I hope that I have answered your questions sufficiently.

Sincerely,

CHARLES A. GRADDICK
Attorney General

INFORMAL OPINIONS

During the period January 1, 1980, through March 31, 1980, the Attorney General rendered the following informal opinions:

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